No. 88-6613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD BOYDE,
Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

BRIEF OF THE CALIFORNIA APPELLATE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGE

INTEREST OF AMICUS CURIAE

Amicus has obtained consent of the parties to file this brief.

The California Appellate Project ("CAP") is a non-profit corporation established by the State Bar of California to recruit attorneys for death penalty appeals in this state and then to assist appointed counsel in providing quality representation. CAP currently provides direct representation to 8 death row defendants and assists appointed counsel in more than 170 other capital appeals. Accordingly, CAP is familiar with the two issues on which certiorari was granted in the present case.

PRELIMINARY STATEMENT

The questions to be resolved in this case involve the constitutionality of a death sentence handed down by a California jury acting in accordance with two now-defunct jury instructions relating to (1) what evidence the jury may consider in mitigation, and (2) how the jury determines whether to sentence the defendant to death. *See* former CALJIC Nos. 8.84.1 & 8.84.2.[1] Although the California Supreme Court subsequently modified both of the challenged instructions in response to many of the concerns that amicus raises in this brief, *see People v. Easley*, 34 Cal.3d 858, 878, n.10 (1983) and *People v. Brown*, 40 Cal.3d 512, 544, nn.17 & 19 (1985), petitioner did not receive the benefit of those changes at his trial.

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1 The sentencing jury at petitioner's trial in 1982 was given the then-standard CALJIC jury instructions, which closely tracked the language of the relevant statutory provision. *See* former CALJIC Nos. 8.84.1 & 8.84.2 (4th ed. 1979); Cal. Penal Code § 190.3.

While the statutory provisions have remained unchanged to the present, the CALJIC instructions have since been revised to conform to *People v. Easley* and *People v. Brown*, *infra*. CALJIC No. 8.84.1 was revised in 1984 and 1986, and CALJIC No. 8.84.2 was revised in 1986. The 1984 and 1986 revisions have recently been renumbered. See CALJIC Nos. 8.85 & 8.88 (5th ed. 1988). See Appendices A & B.

In this brief, amicus refers to the CALJIC instructions used at petitioner's trial as "former CALJIC No. 8.84.1" or "former CALJIC No. 8.84.2." These are the pre-*Easley* and pre-*Brown* versions of CALJIC Nos. 8.84.1 and 8.84.2, respectively. The "former Factor (k) instruction" mentioned in this brief was a part of former CALJIC No. 8.84.1.

STATEMENT OF FACTS

A defendant convicted in a California Superior Court of first-degree murder with one or more "special circumstances" is eligible to be sentenced to death. Cal. Penal Code § 190.2. Generally, the truth or falsity of any alleged special circumstance is determined "at the same time" as the defendant is found guilty of first-degree murder. Cal. Penal Code §§ 190.1(a), 190.4(a).

There are 18 categories of special circumstance that make a first-degree murder conviction into a capital conviction, and those 18 categories encompass at least 27 different kinds of aggravating matters.[2] Cal. Penal Code § 190.2(a).

Once a defendant has been convicted of first-degree murder with one or more special circumstances, the trial proceeds to the penalty phase. Cal. Pen. Code §§ 190.3, 190.4. In general, at the penalty phase "evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition." Cal. Penal Code § 190.3.

In addition to the evidence received at the penalty phase, the sentencer -- normally, a jury -- must also consider "evidence

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[2] This does not include the special circumstance defined in Cal. Penal Code § 190.2(a)(14), which was invalidated by the California Supreme Court in *People v. Superior Court (Engert)*, 31 Cal.3d 797 (1982). Nor have we counted § 190.2(b), which separately provides that all but one of the various special circumstances may be applied to an accomplice of the actual killer.

presented at any prior phase of the trial." Cal. Penal Code § 190.4(d); *see* Reporter's Transcript (RT) 4831:25-26.

After having heard and received all of the evidence, the sentencer is then required to determine which penalty -- life without possibility of parole, or death -- shall be imposed on the defendant. Former CALJIC No. 8.84. The sentencer is to "take into account [eleven enumerated] factors if relevant." Cal. Penal Code § 190.3.[3] If the sentencer concludes, based on "the [eleven] aggravating and mitigating circumstances referred to,"

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[3] The eleven factors listed in § 190.3 (and in former CALJIC No. 8.84.1) are:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

"(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects [sic] of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

that the aggravating circumstances outweigh the mitigating circumstances, then it "shall impose a sentence of death." *Id.* But if it concludes that the mitigating circumstances outweigh the aggravating, it "shall impose a sentence" of life imprisonment without possibility of parole. *Id.*

Two points are worth noting about the factors to be considered by the sentencer. First, the sentencer is limited to considering the eleven factors listed in § 190.3 (and former CALJIC No. 8.84.1). This is clear from the language of §190.3 itself (the sentencer's weighing of aggravation and mitigation involves "the aggravating and mitigating factors referred to in this section"), from the former CALJIC No. 8.84.2 jury instruction (the jury weighs "the applicable factors of aggravating and mitigating circumstances upon which you [the jury] have been instructed," *see* RT 4836:7-9), and from case law, *People v. (Juan) Boyd*, 38 Cal.3d 762, 773-74 (1985).

Second, the sentencer is told to consider the enumerated factors "if relevant" or "if applicable." The sentencer determines when, or if, a factor is "relevant" or "applicable." *People v. Hernandez*, 47 Cal.3d 315, 364 (1988); *People v. Ruiz*, 44 Cal.3d 589, 619-20 (1988).

At petitioner's penalty trial in early 1982, the prosecution presented aggravating evidence of past offenses and other alleged misconduct by petitioner and of his poor reputation with law enforcement officers. *People v. Boyde*, 46 Cal.3d 212, 247-48 (1988). In mitigation, petitioner presented testimony from family and friends describing his deprived background and his good qualities. Petitioner's family was poor, and petitioner had health problems from an early age. He never knew his father. People close to petitioner found him to be a giving person, good with children, and a good companion. He had looked hard for work after his release from prison, but his efforts had been unsuccessful. A psychologist testified that petitioner has an inadequate personality with limited resources and low self-esteem. He is often depressed, and his intelligence was rated at between borderline and dull-normal. When petitioner was younger, his family tried without success to

persuade the school system to provide him with counseling, which they were unable to afford themselves. *Id.* at 248-49.

Petitioner's sentencing jury was given the then-standard CALJIC jury instructions, which closely tracked the language of the relevant statutory provisions. Compare RT 4831-33, 4836, and former CALJIC Nos. 8.84.1 and 8.84.2 with Cal. Penal Code § 190.3. Thus, the jury was instructed to consider the ten specific Factors (a) through (j), as well as Factor (k), which allowed the jurors to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." RT 4832:1 - 4833:6. The jury was then told it "shall impose a sentence of death" if the aggravating circumstances outweighed the mitigating circumstances "upon which you have been instructed." RT 4836:5-12.

This Court should note that neither the former Factor (k) instruction nor the "shall impose death" instruction used at petitioner's trial would be given in a capital trial in California today. For the past five and one-half years, the California Supreme Court has recognized that a jury instruction which tracks the exact language of Factor (k) in § 190.3 might not adequately convey the scope of mitigating evidence that a sentencing jury is constitutionally required to consider. *People v. Easley*, 34 Cal.3d 858. The court has therefore ordered that the language of the former Factor (k) instruction be expanded to allow the jury to consider "any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'" *Id.*, at 878, n.10.

In 1985 the California Supreme Court similarly ordered substantial revisions to what was formerly the "shall impose death" instruction. *People v. Brown*, 40 Cal.3d at 544, nn.17 & 19. Now, in lieu of being required to impose death whenever the aggravating circumstances outweigh the mitigating circumstances, a California sentencing jury is instructed to "determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating

circumstances." CALJIC No. 8.88 (5th ed. 1988); *see also* former CALJIC No. 8.84.2 (1986 Revision).

SUMMARY OF ARGUMENT

The issue in this case is the constitutionality, as applied to petitioner's trial, of two now-abandoned jury instructions whose effect, singly and collectively, was to prevent the jury from "considering, as a mitigating factor," or from "giving independent mitigating weight to," any "aspects of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 605 (1978) (emphasis omitted). The California Supreme Court found, by a four-to-three vote, that there was no constitutional violation as to either of the challenged instructions. *People v. Boyde*, 46 Cal.3d 212, 251, 255 (1988).

The first instruction raises the question whether a reasonable juror would understand from the language of the former Factor (k) instruction that he or she could consider and give effect to evidence of petitioner's background and character even if that evidence did not extenuate or relate to the crime itself. The short answer to this question is "no." The former Factor (k) instruction allowed the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The plain meaning of this instruction, by itself and when considered in conjunction with the other mitigating factors in the jury instructions, is that mitigating evidence unrelated to the crime was not to be taken into account.

This straightforward reading of the instructions is reinforced by convincing real-world evidence. Before *Easley*'s revision of the former Factor (k) instruction, it was the widespread practice of prosecutors, attorneys general, judges, and even defense counsel to interpret that instruction in precisely the unconstitutional manner indicated by the plain language of the instruction. Because such powerful empirical evidence coincides with the natural import of the instruction, the

conclusion is unavoidable that reasonable jurors, too, would have interpreted that language in the same manner. At the very minimum, "a reasonable juror could have understood the charge" as having an unconstitutional meaning. *Francis v. Franklin*, 471 U.S. 307, 315-16 (1985).

The second instruction at issue in the present case told the jury that it "shall impose a sentence of death" if the aggravating circumstances outweighed the mitigating circumstances. RT 4836:10-12. Amicus first argues that this simplistic formula dictated the choice of penalty by a mechanical weighing of aggravation against mitigation and thus conflicted with the constitutionally required determination of whether death is the appropriate punishment.

Next, amicus surveys the performance of California prosecutors in arguing the import of the mandatory sentencing instruction to their penalty juries, and demonstrates the frequency with which the prosecutors read the instruction to *require* a mechanistic weighing of aggravation versus mitigation and to *preclude* moral consideration of whether death is the appropriate punishment. Amicus urges that this extensive track record of prosecutorial explication of the instruction indicates how reasonable penalty jurors as well would have understood the instruction.

Amicus also examines the capital sentencing experience in Alameda County, California, during a period when penalty juries were *not* instructed with the mandatory sentencing formula and were instead given the option of returning a life verdict even if aggravation was found to outweigh mitigation. The numerous life verdicts accompanied by a finding that aggravation outweighs mitigation demonstrate that the simplistic weighing formula embodied in the mandatory sentencing instruction is *in no way* a proxy for the constitutionally required determination of whether death is the appropriate punishment.

ARGUMENT

I.

THE FORMER FACTOR (K) INSTRUCTION WOULD HAVE BEEN UNDERSTOOD BY A REASONABLE JUROR AS LIMITING THE JURY'S CONSIDERATION OF MITIGATING EVIDENCE TO THAT WHICH RELATED TO "THE CRIME" ITSELF.

It is settled that a sentencing authority in a capital case may not constitutionally be precluded from "considering, as a mitigating factor," or from "giving independent mitigating weight to," any "aspects of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. at 604 & 605; *see* e.g., *Penry v. Lynaugh*, 492 U.S. ___, 45 Crim.L.Rep. 3188, 3192 (1989); *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987).

Relevant mitigating evidence encompasses the "'compassionate or mitigating factors stemming from the diverse frailties of humankind.'" *McCleskey v. Kemp*, 481 U.S. at 304 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). It includes both "mitigating aspects of the crime," *Lowenfield v. Phelps*, 484 U.S. ___, 98 L.Ed.2d 568, 582 (1988), and also mitigation that is *not* related to the crime. "Evidence extraneous to the crime itself is deemed relevant and indeed, constitutionally so . . . ." *Gathers v. South Carolina*, ___ U.S. ___, 45 Crim.L.Rep. 3076, 3079 (1989) (O'Connor, J., dissenting). For even if mitigating inferences from the evidence "would not relate specifically to petitioner's culpability for the crime he committed," nevertheless "such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'" *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (quoting *Lockett v. Ohio*, *supra*, 438 U.S. at 604); *Sumner v. Shuman*, 483 U.S. ___, n.5, 97 L.Ed.2d 56, 66 (1987). See also *Hitchcock v. Dugger*, 481 U.S. 393, 397-98 (1987), in which a unanimous Court reversed a death sentence because the sentencers had been precluded from considering, *inter alia*,

evidence having no bearing on the crime but which showed that "as a child petitioner had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that petitioner had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that petitioner had been a fond and affectionate uncle to the children of one of his brothers."[4]

When a California jury decides whether to sentence a capital defendant to death or life without parole, the framework for its decision is its consideration of an exclusive list of eleven enumerated aggravating and mitigating factors. *See* RT 4836:6-9; former CALJIC No. 8.84.2. While several of these eleven factors refer to some aspect of the defendant's background, record, and the circumstances of the offense, only one factor even purports to give the jury broad authority to consider all relevant aspects of his background and character as independent mitigating circumstances. At the time of petitioner's trial, this one factor was former Factor (k): "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." RT 4833:4-6.

Respondent has defended the former Factor (k) instruction as allowing full consideration of mitigation. In fact, however, the former Factor (k) instruction plainly had the opposite effect. It restricted mitigation to crime-related factors, and it excluded consideration of the kind of mitigating character and background evidence that petitioner presented and that the *Lockett* line of decisions requires to be considered.

Petitioner presented considerable mitigating evidence to establish that, *notwithstanding the gravity of the crime* of which he had been convicted, and even if the jury concluded there

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[4] *See also McCleskey v. Kemp*, 481 U.S. at 307, n.28 ("Numerous legitimate factors may influence the outcome of a trial and defendant's ultimate sentence, even though they may be irrelevant to his actual guilt"); *California v. Brown*, 479 U.S. 538, 544-46 (1987) (O'Connor, J., concurring).

were no circumstances extenuating the seriousness of the crime, there were in petitioner's character and background certain redeeming qualities and other compassionate "factors stemming from the diverse frailties of humankind" such that he should not die for his crime. *See Woodson v. North Carolina*, 428 U.S. at 304. For example, the sentencing jury was told about the poverty in which petitioner grew up, and about the family's abandonment by petitioner's father and petitioner's obsession with that loss. The jury heard about petitioner's ill health and early psychological problems and his family's unsuccessful efforts to obtain counseling for him. The jury also heard expert testimony regarding petitioner's inadequate personality, his limited resources, low self-esteem and frequent depression. There was also evidence of petitioner's considerable efforts to obtain work and of his good relationships with children and others close to him.

Under *Lockett*, *Skipper*, *Hitchcock*, and *Penry*, petitioner was constitutionally entitled to have the sentencer consider all of this evidence in mitigation of punishment, but no reasonable juror would have understood this from the former Factor (k) instruction given at the trial. Rather, upon hearing that mitigation was limited to that which extenuates the gravity of "the crime" even though it is not a legal excuse for "the crime," a reasonable juror would have concluded that petitioner's mitigation evidence was irrelevant because it was "extraneous to the crime itself," *Gathers v. South Carolina*, 45 Crim.L.Rep. at 3079 (O'Connor, J., dissenting), or "would not relate specifically to petitioner's culpability for the crime he committed," *Skipper v. Ohio*, 476 U.S. at 4.

This unconstitutional interpretation of the former Factor (k) instruction was also compelled by the language of the immediately preceding factors listed in former CALJIC No. 8.84.1. For, every one of the other purely mitigating factors[5] in

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5 Factors (d), (e), (f), (g), (h), and (j) are purely mitigating factors, *People v. Hamilton*, 48 Cal.3d 1142, 1184 (1989) and cases cited, as is Factor (k), *People v. Edelbacher*, 47 Cal.3d 983, 1033 (1989).

former CALJIC No. 8.84.1, as well as the "metonym" (Factor (i)),[6] contained words of limitation equivalent to those used in the former Factor (k) instruction. Thus, Factor (h) allowed consideration of a defendant's impaired capacity only insofar as this impairment operated "at the time of the offense." Factor (d) authorized consideration of a defendant's extreme mental or emotional disturbance only if it operated while "the offense was committed." Factor (i) permitted consideration of the defendant's age "at the time of the crime." In a parallel fashion, the remaining mitigating factors could be deemed applicable or relevant only insofar as they related to "the offense" (Factors (f) and (j)), to "the defendant's homicidal conduct" or "homicidal act" (Factor (e)), or to the time that "defendant acted" (Factor (g)).

After hearing this unbroken sequence of instructions limiting mitigating factors to the crime itself, no reasonable juror would have interpreted the former Factor (k) instruction -- which also spoke of mitigation relating to "the crime" -- to mean that mitigation *not* related to the crime could be considered. No reasonable juror would have concluded that although the former Factor (k) instruction seemed to contain the same kind of limitation as appeared in Factors (d) through (j), nevertheless the former Factor (k) instruction opened up consideration of an entirely new kind of mitigating evidence. No reasonable juror would have concluded that, as to Factor (k) but only Factor (k), character and background evidence extraneous to the crime itself could be considered.

Thus, not only is the language of the former Factor (k) instruction likely to be interpreted in an unconstitutional

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6 Factor (i) refers to "[t]he age of the defendant at the time of the crime." The California Supreme Court has ruled that "mere chronological age by itself is not relevant to the appropriate penalty and is neither aggravating nor mitigating." *People v. Bean*, 46 Cal.3d 919, 952 (1988). Rather, Factor (i) is a "metonym" that refers to "any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty." *People v. Lucky*, 45 Cal.3d 259, 302 (1988).

manner when viewed on its own terms, but that interpretation is reinforced, indeed compelled, by the restrictive language of the seven Factors that preceded it. Thus a fair-minded juror would clearly have understood the instructions in petitioner's case as restricting his or her consideration of mitigating evidence in an unconstitutional manner. *See Cabana v. Bullock*, 474 U.S. 376, 383 (1986).

That reasonable jurors would have understood the former Factor (k) instructions in an unconstitutionally restrictive manner is dramatically confirmed by evidence from the "real world" of death penalty litigation in California. Before November 1983, when the California Supreme Court directed that the former version of the Factor (k) instruction be modified in future trials, *People v. Easley*, 34 Cal.3d at 878, n.10, it was a common occurrence to find California deputy district attorneys, judges, deputy attorneys general, and indeed defense counsel interpreting the former Factor (k) instruction to exclude consideration of background and character evidence. Their interpretations were not based on any appellate court decision or any arcane principle of law; rather, they were based on a common sense reading of the plain words of the statute and the CALJIC instruction. Taking these prosecutors and judges to be reasonable persons, we have, then, very compelling evidence that other reasonable persons -- namely, jurors in capital cases -- would also arrive at an unconstitutional interpretation of the former Factor (k) instruction in former CALJIC No. 8.84.1.

The following examples powerfully illustrate the common pre-*Easley* interpretation of the former CALJIC instruction on Factor (k). In *People v. Davenport*, Cal. Sup. Ct. Crim. No. 22356, the prosecutor explained the former Factor (k) instruction to the penalty jury in the following terms: "All right, the next thing [is] whether there are any other circumstances, any other circumstance that extenuates the gravity of the crime even though it is not a legal excuse for the crime. [¶] Now, a little attention to the way that is written is whether there is any circumstance that extenuates the gravity of the crime -- [¶] All right, I recognize in this case, in the penalty phase, we have

evidence presented by the defense, primarily about what a bad person the defendant's mother was and that the defendant did not receive good treatment at all times at the hands of his mother. [¶] I submit to you that, you know, in order to find it to be a mitigating circumstance, you have got to find, somehow, that it is something it has something to do with the crime because this asks you to [consider], a circumstance that extenuates the gravity of the crime." Crim. No. 22356, RT 3004-05.

Similarly, the prosecutor in *People v. Payton*, Crim. No. 22511, told the penalty jury that "[Factor] 'K' says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some fact -- okay? -- some factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did. [¶] It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this newborn Christianity. . . . Referring back to 'K' which I was talking about, any other circumstance which extenuates or lessens the gravity of the crime, the only defense evidence you've heard had to do with defendant's new Christianity and that he helped the module deputies in the jail while he was in custody. [¶] The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed. [Defense counsel] will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that can happen when -- under any other circumstance which extenuates or lessens the gravity of the crime, refers -- seems to refer to a fact in operation at the time of the offense. [¶] What I am getting at, you have not heard during the past few days any legal evidence mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all." Crim. No. 22511, RT 2121-22, 2125.

In a similar vein, the prosecutor in *People v. Guzman*, Crim. No. 22418, told the penalty jury the following about Factor (k)

and the defense evidence in mitigation: "Finally, were there any other extenuating circumstances that somehow lessen the gravity of the crime of murder? Certainly not. None whatsoever. . . . The only thing that the defendant has brought forward here that he testified to, he says he testified to it in behalf of his argument for death, is his ability to paint. [¶] Well, we can see that. These paintings are high quality. He does fine work for someone who certainly learned on his own, took the initiative to learn it in prison. He should be commended for that. That's fine. But it certainly is not a factor in mitigation. [¶] When you hear the law as I anticipate the Court will instruct you, you won't hear anything about whether or not someone is a painter. . . ." Crim. No. 22418, RT 1571, 1575-76.

Again, in *People v. Keenan*, Crim. 22956, defense mitigating evidence was adverted to by the prosecutor in the following terms: "the law does provide for any extenuating circumstances, any other circumstance which extenuates the gravity of the crime. [¶] I question the relevance of the testimony from Ms. Cherry and Mr. Haney. I do so because essentially, as I view it, their testimony related to present conditions at San Quentin prison over in Tamal in Marin County and an opinion as to how the defendant, Maurice Keenan, might adapt himself to those conditions. [¶] I question the relevance of that because it does not go to the gravity of the crime." Crim. No. 22956, RT 3513.

Trial judges, too, had the same view of Factor (k). For example, in *People v. Bigelow*, Crim. 22018, at the hearing where the judge was to rule on the defendant's motion to modify the death verdict pursuant to California Penal Code § 190.4(e), the judge stated, "No, I don't think that [testimony from the defendant's brothers and sisters concerning the defendant's childhood and 'not being raised with proper parents'] would [fall within the 'catchall K']. I don't see how your childhood, because you've evidently had a not too happy childhood, but that doesn't give you the right to come to America and take an innocent man and kill him. Does it?" Crim. No. 22018, 5/8/81 RT 28.

Similarly, in *People v. Edelbacher*, Crim. 23126, where the defendant had presented testimony from eight defense witnesses as to numerous positive qualities displayed by the defendant, the judge ruled at the motion for reduction of penalty that "[t]he members of the defendant's family and friends of the family who testified did not, in the Court's opinion, present any evidence which could be considered as a moral justification or extenuation for his conduct" and that "there are no factors in mitigation." Crim. No. 23126, RT 5276.

Indeed, so pervasive was the common understanding of the limited scope of the former Factor (k) instruction that defense counsel felt constrained against presenting relevant mitigating evidence.[7] Nor have these misunderstandings of Factor (k)

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7 For example, in *People v. Hitchings*, Cal. Sup. Ct. Nos. Crim. 23905 and S004189, the trial attorneys had refrained from presenting mitigating evidence unrelated to the crime. When these omissions were challenged in a state habeas corpus petition as (*inter alia*) the constitutionally inadequate assistance of counsel, the attorneys filed affidavits explaining under penalty of perjury that, for example, "[f]rom my reading of the statutory factors in aggravation and mitigation, I saw no basis upon which the jury would be expressly authorized to consider the sympathetic circumstances of Keith's background as a mitigating factor. The one broad factor (factor 'k') appeared by the statutory language to be limited to factors relating to the crime. This was my understanding of factor 'k' and *I believe this was also the understanding of District Attorney and trial judge.*" S004189, affidavit of William T. Kay, Jr. (emphasis added).

Similarly, his cocounsel declared that "'Factor k' – the only broad factor – appeared by its language to be specifically limited to mitigation of 'the gravity of the crime.'" Affidavit of Paul Brisso.

been limited to trial participants. On appeal in *People v. Lucero*, Crim. No. 22504, the attorney general's office argued that "[t]he evidence presented at the penalty phase should mitigate or aggravate the penalty for the offense of which a defendant has been convicted. . . . However, evidence relating to the offender should have some relationship to the offense. Simply asserting that a defendant has a problem when the witness cannot tie in the problem with what happened in the case is thus of no value and adds nothing to the issue before the jury." Crim. No. 22504, Respondent's Brief at 56.[8]

A limited interpretation of the former Factor (k) instruction so clearly flows from its plain language that in *People v. McDowell*, Crim. No. 24110, eleven of twelve jurors sought the trial court's assistance in correcting the contrary view of the lone holdout. During deliberations, the jury sent the following note to the judge: "Direction. We have an 11-to-one vote for death. The one juror emphatically feels the mitigating circumstances are equal to the aggravating circumstances. The other eleven jurors do not agree with the juror's mitigating circumstances as all being testimony or evidence that should be considered. [¶] Please advise which following circumstances can be considered mitigating circumstances: No. 1. Inadequate or insufficient psychiatric help. No. 2. Love-hate relationship with father/mother. No. 3. Daily and extreme mental abuse by father. Also witness to daily physical abuse to mother and siblings. No. 4. Religious extremes confused defendant. No. 5. Confusing sexual mores at home. Parent incest with mother condoning or aware of incest/abuse. No. 6. Accused of death

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[8] It is also significant to note that the attorney general's brief on appeal in *People v. Sixto*, Crim. No. 22990, admitted that the language of the former Factor (k) instruction "obviously does not specifically inform a jury to consider defendant's character and background evidence . . . ." Respondent's Brief at 194. (Respondent went on to argue that Mr. Sixto's death sentence was valid because Sixto had been allowed to present mitigating evidence and because the jury had been instructed to consider all the evidence received in any phase of the trial. *Ibid.* This is the same reasoning as proffered by the state court in petitioner's case and is disposed of later in this section. *See* fn. 11 and accompanying text.)

of favorite sister. No. 7. Stress of divorce from family. No. 8. Rejection of mother's love during teen years. Thank you." Crim. No. 24110, RT 2429-30.[9]

Thus, in determining how a reasonable juror would have understood the former Factor (k) instruction, this Court will find a complete convergence of (1) the most reasonable interpretation of the words of the instruction itself, (2) the meaning of the seven preceding factors in former CALJIC No. 8.84.1, and (3) the contemporaneous understanding of the meaning of those words by prosecutors and judges familiar with both the language and context of Factor (k). The inevitable conclusion is that the jurors at petitioner's trial would have understood the former Factor (k) instruction as limiting their ability to consider and give effect to petitioner's mitigating evidence.

And, a fortiori, under the applicable test of whether "a reasonable juror could have understood the charge" as having an unconstitutional meaning, a finding of constitutional error is even more clearly compelled. *Francis v. Franklin*, *supra*, 471 U.S. at 315-16; *Sandstrom v. Montana*, 442 U.S. 510, 516-17 (1979); *Mills v. Maryland*, 486 U.S. ___, 100 L.Ed.2d 384, 394 (1988); *see also Andres v. United States*, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of §567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused.").

The California Supreme Court upheld petitioner's death sentence on the ground that, because the jury "was permitted to hear defendant's background and character evidence and his attorney's lengthy argument concerning that evidence," the jury must have considered the evidence. *People v. Boyde*, 46 Cal.3d at 251. But, as this Court has repeatedly made clear, "the

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[9] Despite defense counsel's request that the jury be informed that all eight listed factors were "proper," the judge in *McDowell* told the jury to "go back and read the instructions." RT 2435. The jury returned a death verdict.

provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury." *Gregg v. Georgia*, 428 U.S. 153, 192 (1976). "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry v. Lynaugh*, 45 Crim.L.Rep. at 3192; *Hitchcock v. Dugger*, 481 U.S. at 398-99; *Eddings v. Ohio*, 455 U.S. 104 at 113; *id.* at 119 (O'Connor, J., concurring).

These constitutional principles have particular relevance to a case where, as at petitioner's trial, the judge informs the sentencing jury that they may consider and weigh only the aggravating and mitigating factors "upon which you have been instructed." RT 4836:7-9. If only one of the enumerated factors purports to cover the defendant's background and character in general, then that factor must not preclude consideration of relevant character and background evidence that is "extraneous to the crime itself." *Gathers v. South Carolina*, 45 Crim.L.Rep. at 3079 (O'Connor, J., dissenting).

Indeed, the California Supreme Court's reliance on petitioner's presentation and argument concerning mitigating evidence flatly contradicts this Court's decisions in *Hitchcock* and *Penry*. In *Hitchcock*, the defendant both presented mitigating evidence of his character and background and also argued to the advisory jury that it was to "consider everything together." 481 U.S. at 398. However, because the instructions listed the eight "mitigating circumstances which you may consider" -- none of which covered character and background evidence -- this Court unanimously held "it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." *Id.* at 398-99.

Likewise, in *Penry*, *supra*, although the defendant "was free to introduce and argue the significance of his mitigating circumstances to the jury," 45 Crim.L.Rep. at 3194, nevertheless

this Court reversed because of "the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence," *id.* at 3195.[10]

Thus, the fact that petitioner Boyde was allowed to proffer relevant mitigating evidence cannot overcome the plain fact that the effect of the instructions in his case was to tell the jury not to consider it.[11]

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[10] This Court has reached analogous results in cases where the judge was the sole sentencing authority. In both *Eddings* and *Lockett*, mitigating evidence was admitted before the sentencing judge. However, because the judge in each case believed the evidence was irrelevant to his sentencing decision, *Eddings*, 455 U.S. at 113, or was beyond "[t]he limited range of mitigating circumstances which [could] be considered," *Lockett*, 438 U.S. at 608, this Court reversed the death judgments. The results in *Hitchcock*, *Penry*, and petitioner's case are merely applications of the *Lockett-Eddings* principles to cases where the jury plays a major sentencing role.

[11] For similar reasons, the California Supreme Court was unjustified in relying on the instruction to petitioner's jury to "consider all of the evidence which has been received during any part of the trial of this case." Boyd, 46 Cal.3d at 251; RT 4831:25-26. The fallacy in the lower court's reasoning is that the instruction to "consider all of the evidence" has nothing to do with what *issues* the jury must decide, but merely tells the jury where to look to find the information needed to decide the issues.

This Court recognized this very distinction in *Lockett v. Ohio*. At issue in *Lockett* was the constitutionality of a death sentence arrived at under the then-existing Ohio death penalty scheme. Although the sentencer was required under that system to "consider[] the nature and circumstances of the offense and the history, character, and condition of the offender," *see State v. Bayless*, 48 Ohio St.2d 73, 86 (1976), such evidence was made relevant for mitigating purposes only insofar as it shed light on one of three statutory mitigating circumstances. *Lockett*, 438 U.S. at 607-08. This Court struck down the death sentence, because despite the broad scope of the evidence that could be considered, the sentencer could give mitigating effect to that evidence only insofar as the evidence was relevant to "the three factors specified in the statute." *Id.* at 608.

As *Lockett* shows, an open-ended provision about what evidence may be admitted or considered does *not* cure the defect of limiting the mitigating factors to which the evidence relates. Thus, the Court in *Lockett*, rejected the reasoning

(continued on following page)

II.

THE CALIFORNIA MANDATORY SENTENCING INSTRUCTION VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. California Could Not Constitutionally Require That The Choice Of Penalty Be Dictated By A Mechanical Formula Which Was Inconsistent With The Determination Of Whether Death Is The Appropriate Punishment.

The Eighth and Fourteenth Amendments afford a capital defendant the right to a determination by the trier of fact on the ultimate question of whether, upon consideration of aggravating and mitigating evidence, "death is the appropriate punishment." *Penry v. Lynaugh*, 45 Crim.L.Rep. at 3195. While no single procedure or instruction is indispensable to the implementation of this fundamental principle, the constitutional bottom line is that any particular capital sentencing procedure must enable the trier of fact to render a reasoned moral judgment as to the appropriateness of the death penalty. *California v. Brown*, 479 U.S. at 545 (O'Connor J., concurring). The trier of fact cannot be compelled to return a death verdict based solely upon a determination that aggravating factors exist that surpass the constitutional threshold for imposition of the death penalty. *Sumner v. Shuman*, 97 L.Ed.2d at 65-66. Nor may the trier of fact be precluded from returning a life verdict based on the defendant's mitigating evidence, *Hitchcock v. Dugger*, 481 U.S. 393, simply because the prosecution has

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used by the California Supreme Court in petitioner's case. See also Penry v. Lynaugh, 45 Crim.L.Rep. 3188 (although the *Penry* sentencing jury "could consider all the evidence submitted in both the guilt or innocence phase and the penalty phase of the trial," *id.* at 3190, Penry's sentence was reversed because the instructions guiding the jury's actual sentencing decision did not provide a vehicle for the jury to give mitigating effect to his mitigating evidence).

presented a large quantity of aggravating evidence, *Sumner v. Shuman*, 97 L.Ed.2d at 67-70.

The California mandatory sentencing instruction at issue in this case ("If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death") violated these fundamental constitutional principles. It restricted the penalty jury's deliberative process to a mechanistic weighing of aggravating and mitigating factors *against each other*, without permitting any determination that the case in aggravation was simply insufficient to warrant a death sentence (regardless of the quantum of mitigation involved) or that the case in mitigation was sufficient to warrant a life sentence (regardless of the quantum of aggravation involved). Thus, it mandated a choice of penalty based on this mechanistic weighing process without any provision for (indeed, to the exclusion of) any overall determination, any reasoned *moral* evaluation, of whether death is the appropriate punishment.

This severe circumscription of the jury's sentencing discretion, skewing the choice of penalty toward death, violates the constitutional guarantee of an individualized sentencing decision. "Indeed, the California Supreme Court has conceded that a juror who finds that the aggravating evidence outweighs the mitigating evidence, but who believes that the death sentence is not appropriate, may reasonably understand [the mandatory sentencing instruction] to require him to vote for a sentence of death." *California v. Hamilton*, ___ U.S. ___, 102 L.Ed.2d 1002, 1004 (1989) (Marshall, J., dissenting from denial of certiorari) (citing *People v. Brown*, 40 Cal.3d 512, *People v. Myers*, 43 Cal.3d 250 (1987) and *People v. Hamilton*, 45 Cal.3d 351 (1988)).[12]

12 *See also State v. Holland*, No. 870410 (Utah, June 21, 1989) (vacating death sentence as unconstitutional because trial court merely found that aggravation outweighed mitigation and failed to make the necessary further determination of whether death was the appropriate punishment under all of the circumstances.)

B. The Established Track Record Of California Prosecutors In Arguing The Meaning Of The Former CALJIC No. 8.84.2 Sentencing Instruction Demonstrates That Reasonable Penalty Jurors Would Have Understood It To Limit Their Penalty Decision To A Mandatory Result Dictated By A Mechanistic Weighing Procedure.

As in Argument I, amicus now summarizes how the state's prosecutors have read the challenged instruction as a strong indication of how reasonable penalty jurors would understand it.

Amicus submits that the following examples of prosecutorial penalty argument regarding the identical instruction given in Boyde's case demonstrate that reasonable jurors would have understood themselves as being precluded from making a reasoned moral response to the overall aggravating and mitigation evidence, and instead as being directed to engage in a mechanistic weighing process in which any tipping of the scale, no matter how slight, dictated the choice of penalty.

1. *People v. Bittaker*, Crim. No. 21942. The jury was given the same instruction as in *Boyde*, and the prosecutor argued as follows:

> Now here's the real important paragraph. If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. Now that takes some of the burden off of you. It's not a question of whether you like the death penalty or you don't like it or you're in favor of it or you're opposed to it. You're bound by law, you're bound as jurors to follow the law . . . what this means is, say to give a simple example, if we were to give actual weight in pounds and ounces to the aggravating circumstances and the mitigating circumstances, *if the aggravating circumstances weighed 10 pounds 1 ounce the mitigating circumstances weighed 10 pounds 1 ounce the mitigating circumstances weighed 10 pounds, then you would be duty bound to impose a death penalty.*[13]
>
> Now obviously I don't think in this case that it's even close. I mean the aggravating circumstances on a scale, they're going to put the scale way down at the bottom and the mitigating circumstances aren't going to make that scale even come off the ground . . . . *If you were to give a percentage to it, if you said 50.1% of the evidence pointed to aggravating circumstances and 49.9 pointed to mitigating circumstances, then you still have to impose a sentence of death.*[14] Crim. No. 21942, RT 2549-51 (emphasis supplied).

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13 The state's prosecutors routinely argued the choice of penalty is dictated for the jurors by the weighing process provided by the law, rather than the jurors' moral evaluation. *See, e.g., People v. Adcox*, Crim. No. 23192 ("You haven't any choice," RT 4606); *People v. Allison*, Crim. No. 24058 ("You must vote for death. The word shall is in the instruction." RT 956); *People v. Bonin*, Crim. No. 23286 ("The applicable standard is 'shall, shall' . . . . It doesn't give any discretion once you have found the factors either aggravating or mitigating," RT 10074); *People v. Burton*, Crim. No. 24589 ("you shall. It is mandatory. You don't have any choice about the matter . . . ." RT 509); *People v. Clark*, Crim. No. 23019 ("you have no discretion, individually or collectively, the law requires you to impose a sentence of death. Says 'you shall,'" RT 12865); *People v. Gonzalez*, Crim. No. 22136 ("So there is no option, once you do your calculations . . . His Honor said your job is a weighing process. It's not for you to think, 'Well, I think this is an appropriate-type case; no, this is not an appropriate-type case.' That is not for you to decide. Not really." RT 4678-79, 4747); *People v. Howard*, Crim. No. 22641 ("notice in that language the word shall . . . It's mandatory type of language," RT 3088).

14 California prosecutors similarly pursue with regularity the theme that the penalty jurors' task is a simple and mechanical weighing or balancing process, not a moral evaluative process. *See*, e.g., *People v. Farmer*, Crim. No. 22960 ("You decide does aggravating outweigh mitigating . . . . That is all you decide. The law does the rest." RT 4132-33); *People v. Guzman*, Crim. No. 22418 ("You simply weigh the aggravating factors against the mitigating factors and whichever outweighs the other is the verdict you shall return according to law. . . . It's just that simple. The law lightens your burden in that regard, in the analysis that you go through." RT 1580, 1566); *People v. Sheldon*, Crim. No.

(*continued on following page*)

2. *People v. Edelbacher*, Crim. No. 23126. The jury was given the same instruction as in *Boyde*, and the prosecutor argued as follows in his initial presentation to the penalty jury:

> [I]f the aggravating circumstances outweigh the mitigating, you're obligated to and you would not be doing the criminal justice system a favor if you said, for example, do we feel in general the death penalty should be applied in this case? That's not the law. The law is to weigh the aggravating circumstances. RT 5173.

The prosecutor further stated in his concluding argument:

> You're going to be instructed to weigh these aggravating factors and mitigating factors. And if the aggravating outweigh the mitigating you return the penalty of death. It's as simple as that, and it does not matter what [defense counsel] feels . . . . The law says if you consider these aggravating circumstances here and that they outweigh these mitigating circumstances, you shall return the penalty of death. And none of that sympathetic argument that the defendant has tried to offer you in any way can detract from what you're duty will be or should be as a juror in this case. Crim. No. 23126, RT 5220, 5223-24.

3. *People v. Myers*, Crim. No. 21991. The jury was given the same instruction as in *Boyde*, and the prosecutor argued as follows:

(*continued from preceding page*)

25109 ("It's a very simple concept . . . add up all the factors. . . . If the factors against the defendant outweigh the factors for the defendant, then your duty is to impose the death penalty," RT 2706); *People v. Wade*, Crim. No. 22645 ("[W]hatever outweighs the other is what directs your judgment. . . . It is in essence an uncomplicated process." RT 6453).

> You have a scale[15] on this side and a scale over here on this side, and you put the aggravating factors, the weight you attach to them here, and those in mitigation over here and see which one weighs the most. It is that simple.
>
> * * *
>
> Once you determine, once you make a determination as to whether or not the aggravating circumstances or factors outweigh those in mitigation or the mitigating circumstances or factors outweigh those in aggravation, then the law says what verdict you shall return.
>
> You don't make up your mind as to your preference for penalties. All you are doing is weighing, a weighing process; and the law is very explicit.
>
> * * *
>
> If you find the aggravating factors outweigh those in mitigation, it shall be your duty to affix the verdict of the death penalty. You don't determine that. The law has determined that for you. Crim. No. 21991, RT 6446, 6526-27.

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15 Prosecutors have frequently emphasized the simple, mechanical nature of the penalty decision under the challenged instruction by employing the metaphor of a scale to delineate the limited scope of the jury's responsibility. *See, e.g.*, *People v. Hamilton*, Crim. No. 22311 ("You have a scale in front of you. One is for aggravation and one is for mitigation. [I]f . . . that scale tips at all toward the factors in aggravation outweighing the circumstances in mitigation, then you are bound by law to impose the sentence of death in this case." RT19B at 14-15); *People v. Lang*, Crim. No. 24257 ("If the scale goes down on the side of aggravation, the law says there can be only one penalty . . . if you find that scale drops, goes down on the side of aggravation, your duty, I'm afraid it is clear. You must impose the death penalty, even if you don't like it. That's your duty, and you have a duty to follow the law, and I'm confident that you can." RT 2595, 2597); *People v. Marshall*, Crim. No. 23189 ("It is a weighing process. You weigh the mitigating circumstances along with those two aggravating circumstances, and whichever side of the scale balances, or weighs more heavily than the other, that is the way you decide the issue of penalty." RT 8820).

These examples of prosecutors' penalty arguments demonstrate the understanding of the mandatory sentencing instruction on the part of California prosecutors prior to the major restructuring of the sentencing charge in *People v. Brown*. Amicus submits that jurors would similarly have arrived at this understanding of the instruction, and consequently would have performed their sentencing function in an unconstitutionally truncated and mechanical manner.[16]

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[16] As in Argument I, amicus derives support for the position that reasonable jurors would understand the challenged instruction to restrict their individualized sentencing discretion by reference not only to prosecutorial argument but to other phases of the capital trial proceedings as well. For example, during voir dire the prosecutor in *People v. (John) Brown* told a juror that, "if you determine that the aggravating factors are just a little bit heavier than the mitigating factors, then the law requires you to return a death penalty verdict." He then elicited a commitment from the juror that she could:

> look at yourself and say, "okay,. . . I feel these aggravating factors outweigh the mitigating factors, but I am still kind of on the fence about the death penalty. I am not sure about the death penalty, but in my mind I feel aggravation outweighs the mitigation." You will comply with the law and return a death penalty verdict? 46 Cal.3d 432, 453 n.9.

Another striking illustration that a penalty jury did in fact understand its sentencing responsibility to be truncated and circumscribed occurred in *People v. Belmontes*, Crim. No. 22810. In that case, without particular prosecutorial prodding, the jury returned to the court during penalty deliberations, declared their extreme difficulty in arriving at a verdict and posed the following question and received the following responses from the court:

> JUROR HERN: The statement about the aggravation [sic] and mitigation [sic] of the circumstances, now that was the listing?
>
> THE COURT: That was the listing, yes ma'am.
>
> JUROR HERN: *Of those certain factors we were to decide one or the other and then balance the sheet*?
>
> THE COURT: That's right, it is a balancing process.

Crim. No. 22810, RT 2501-02 (emphasis supplied).

C. The Capital Sentencing Experience Of Alameda County Demonstrates That The Simplistic Weighing Formula And Mandatory Sentencing Instruction Used At Petitioner's Trial Was Not At All A Proxy For The Constitutionally Required Determination Whether Death Is The Appropriate Punishment.

In this section, amicus presents the striking results of the capital sentencing experience in Alameda County, California, during a period when that county employed a set of capital sentencing instructions and related verdict forms that differed from other California counties that tracked the mandatory sentencing formula set forth in the California Penal Code. As will be shown in detail below, Alameda County, in effect, became a laboratory experiment for testing whether the mandatory sentencing instruction skewed the penalty decision toward death and interfered with the constitutionally correct penalty determination. The penalty verdicts rendered under this modified system demonstrate beyond peradventure that a death penalty decision mandated by a mechanical weighing process is not at all a true reflection of the jury's assessment of the appropriateness of the death penalty based on their overall evaluation of aggravating and mitigating evidence.

In the early 1980's the bench and bar of Alameda County, reacting to growing concern about the constitutionality of the former CALJIC 8.84.2 instruction, modified that instruction to remove its mandatory aspect. Thus, penalty juries were instructed that "if you find that aggravating circumstances outweigh mitigating circumstances, you *may* impose the death penalty." (Emphasis supplied.)

Beginning in 1983, most penalty juries were also given four verdict forms on which they indicated their consensus as to the weight of aggravating circumstances versus mitigating circumstances, in addition to their consensus regarding penalty. The standard four verdict forms read as follows:

> 1. We, the jury in the above cause, find that although the aggravating factors outweigh the mitigating factors, we fix the punishment of LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE.

2. We, the jury in the above entitled cause, find the aggravating factors outweigh the mitigating factors and fix the punishment at DEATH.

3. We, the jury in the above entitled cause, find that the aggravating circumstances do not outweigh the mitigating factors and fix the punishment at LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE.

4. We, the jury in the above entitled cause, find that the mitigating factors outweigh the aggravating factors and fix the punishment at LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE. See verdict forms described in instructions given in *People v. Weston*, Alameda Superior Court No. 74301A, attached hereto as Appendix C.

Amicus has identified nineteen penalty trials in Alameda County from 1983 to 1988, when these instructions and verdict forms (or slight permutations thereof) were used. The results are set forth in the accompanying Table A. Of the fifteen cases in which the jury found that aggravating circumstances outweighed mitigating circumstances under the permissive sentencing instruction, the jury opted for a sentence of death in seven cases.

But the most striking and instructive aspect of this data is that in the *eight* other cases where juries similarly found *that aggravation outweighed mitigation, they nonetheless opted for a life sentence*.[17]

The juries' findings in these cases demonstrate quite clearly that a determination that aggravation outweighs mitigation does *not* mean that the jury necessarily, *or even usually*, believes that death is the appropriate punishment.

Had the mechanical weighing formula and mandatory sentencing instruction used in *Boyde* been given in Alameda County, the eight juries which returned these life verdicts would

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[17] In the remaining four cases, the jury found that mitigation either was equal to or outweighed aggravation, and returned a life sentence.

TABLE A

ALAMEDA COUNTY DEATH PENALTY TRIALS IN WHICH THE JURY WAS GIVEN FOUR ALTERNATIVE VERDICT FORMS AND THE JURY'S VERDICT STATED THE RELATIVE WEIGHT OF AGGRAVATING AND MITIGATING CIRCUMSTANCES

	JURY VERDICT	
	DEATH	LWOP
AGGRAVATION OUTWEIGHS MITIGATION	7[a]	8[b]
MITIGATION OUTWEIGHS AGGRAVATION		1[c]
MITIGATION EQUAL TO OR OUTWEIGHS AGGRAVATION		3[d]

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[a] The cases in this category are: *People v. Day*, Alameda Superior Ct. No. 076328; *People v. Freeman*, No. 79502A; *People v. Hill*, No.84675; *People v. Mason*, No. 72839; *People v. Mitcham*, No. 76826; *People v. Thomas*, No. 83244; *People v. Wash*, No. H06621. The verdict forms are attached as Appendix D.

[b] The cases in this category are: *People v. Barbosa*, Alameda Superior Ct. No. 84803A; *People v. Calderon*, No. 77450; *People v. Delgado*, No. H-4710; *People v. Green*, No. 74716; *People v. Jones*, No. 68289-A; *People v. Quinnell*, No. 79025; *People v. Smith*, No. 77865; *People v. Weston*, Alameda Superior Ct. No. 74301. The verdict forms are attached as Appendix E.

[c] The case in this category is *People v. Pope*, Alameda Superior Ct. No. 67995. The verdict form is attached as Appendix F.

[d] The cases in this category are: *People v. Buckley*, Alameda Superior Ct. No. 76678; 79066; *People v. Domino*, No. H-3319; *People v. Gonzalez*, No. H-2910. The verdict forms are attached as Appendix G.

have been *required* to return a death verdict, albeit manifestly *against* their actual judgment that life was the appropriate sentence. The Alameda County sentencing experience reveals that in a substantial number of cases, juries find that aggravation outweighs mitigation but their reasoned moral response to the overall import of the evidence is that a life- without- parole sentence is appropriate. That reasoned moral response is drastically inhibited, if not entirely precluded, under the mandatory sentencing instruction.

CONCLUSION

The instructions given at petitioner's penalty trial unconstitutionally limited the jury's consideration of his mitigation evidence, and then they compelled the jury to make its life-or-death decision based upon a mechanical weighing of aggravation versus what remained of his mitigation. There is thus an extreme "risk that the death penalty [was] imposed in spite of factors which may call for a less severe punishment," *Lockett v. Ohio*, 438 at 605, and the Eighth and Fourteenth Amendments require that petitioner's death sentence be set aside.

Respectfully submitted,

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APPENDICES

APPENDIX A

Former CALJIC No. 8.84.1 and the 1984, 1986 and 1988 Revisions Thereof

CALJIC 8.84.1 [4th ed. 1979]

PENALTY TRIAL - FACTORS FOR CONSIDERATION

In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed.] You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects [sic] of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

CALJIC 8.84.1 (1984 Revision)

PENALTY TRIAL - FACTORS FOR CONSIDERATION

In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed.] You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death.]

CALJIC 8.84.1 (1986 Revision)

PENALTY TRIAL - FACTORS FOR CONSIDERATION

In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed.] You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle].

CALJIC 8.85

PENALTY TRIAL - FACTORS FOR CONSIDERATION

In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

(b) The presence or absence of criminal activity by the defendant, other than the crime[s] for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle].

APPENDIX B

Former CALJIC 8.84.2 and the 1986 and 1988 Revisions Thereof

CALJIC 8.84.2 [4th ed. 1979]

PENALTY TRIAL - CONCLUDING INSTRUCTION

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possiblity of parole, shall be imposed on [each] defendant.

You are instructed that under the state Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possiblity of parole to a lesser sentence that would include the possiblity of parole.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possiblity of parole.

[In this case you must decide separately the question of the penalty of each of the defendants. If you cannot agree upon the penalty to be inflicted on [both] [all] defendants, but do agree as to the penalty of one [or more] of them, you must render a verdict as to the one [or more] on which you do agree.]

You shall now retire and select one of your number to act as foreman, who will preside over your

deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreman on a form that will be provided and then you shall return with it to this courtroom.

CALJIC 8.84.2 (1986 Revision)

PENALTY TRIAL - CONCLUDING INSTRUCTION

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possiblity of parole, shall be imposed on [each] defendant.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

[In this case you must decide separately the question of the penalty of each of the defendants. If you cannot agree upon the penalty to be inflicted on [both] [all] defendants, but do agree as to the penalty of one [or more] of them, you must render a verdict as to the one [or more] on which you do agree.]

You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreman on a form that will be provided and then you shall return with it to this courtroom.

CALJIC 8.88

PENALTY TRIAL - CONCLUDING INSTRUCTION

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possiblity of parole, shall be imposed on [the] [each] defendant.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

[In this case you must decide separately the question of the penalty of each of the defendants. If you cannot agree upon the penalty to be inflicted on [both] [all] defendants, but do agree as to the penalty of one [or more] of them, you must render a verdict as to the one [or more] on which you do agree.]

You shall now retire and select one of your number to act as foreperson, who will preside over your

deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

APPENDIX C

Excerpt From Penalty Phase Jury Instructions
In People v. Weston, Alameda Superior Court No. 74301A

See materials lodged with the Court.

APPENDIX D

Jury's Penalty Phase Verdicts in
People v. Day, Alameda Superior Ct. No. 076328;
People v. Freeman, No. 79502A;
People v. Hill, No. 84675;
People v. Mason, No. 72839;
People v. Mitcham, No. 76826;
People v. Thomas, No. 83244;
People v. Wash, No. H06621.

See materials lodged with the Court.

APPENDIX E

Jury's Penalty Phase Verdicts in
People v. Barbosa, Alameda Superior Ct. No. 84803A;
People v. Calderon, No. 77450;
People v. Delgado, No. H-4710;
People v. Green, No. 74716;
People v. Jones, No. 68289-A;
People v. Quinnell, No. 79025;
People v. Smith, No. 77865;
People v. Weston, No. 74301.

See materials lodged with the Court.

APPENDIX F

Jury's Penalty Phase Verdicts in
People v. Pope, Alameda Superior Ct. No. 67995

See materials lodged with the Court.

APPENDIX G

Jury's Penalty Phase Verdicts in
People v. Buckley, Alameda Superior Ct. Nos. 76678, 79066;
People v. Domino, H-3319;
People v. Gonzalez, No. H-2910

See materials lodged with the Court.